

EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

10-CR-219S

TONAWANDA COKE CORPORATION
MARK L. KAMHOLZ,

Defendants.

Excerpt of proceedings held before
the Honorable William M. Skretny, U.S.
Courthouse, 2 Niagara Circle, Buffalo,
New York on March 20, 2013.

APPEARANCES:

AARON J. MANGO,
Assistant United States Attorney,
ROCKY PIAGGIONE, Senior Counsel,
U.S. Department of Justice,
Appearing for the United States.

GREGORY F. LINSIN, ESQ.,
JEANNE M. GRASSO, ESQ.,
ARIEL S. GLASNER, ESQ.,
Appearing for Tonawanda Coke Corporation.

RODNEY PERSONIUS, ESQ.,
Appearing for Mark L. Kamholz.

Also Present: Lauren DiFillipo, Paralegal
Sheila Henderson, Paralegal

Michelle L. McLaughlin, RPR,
Official Reporter,
U.S.D.C. W.D.N.Y.
(716)332-3560

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WITNESS

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GARY FOERSCH

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1 though, so overruled.

2 You may answer that question and then move on,
3 Mr. Personius.

4 MR. PERSONIUS: I will, Judge.

5 BY MR. PERSONIUS:

6 Q. Did the discussions about the relative merits
7 of baffles with Mr. Kamholz continue after this
8 letter --

9 A. Yes.

10 Q. -- was sent. In this letter in January of 1997
11 did you -- you continued to do inspections at
12 Tonawanda Coke?

13 A. Yes, I did.

14 Q. And they continued to be on an annual basis?

15 A. Yes.

16 Q. Okay. After this letter of January of 1997, as
17 part of your inspections at Tonawanda Coke, do you
18 have a recollection if you ever checked inside of
19 quench tower number 2?

20 A. Could you restate that?

21 Q. Yes. I'm sorry. This letter that we've been
22 referring to from January of 1997, after that
23 letter had been sent to Mr. Kamholz, start it this
24 way, you continued to do your annual inspections,
25 correct?

1 A. Correct.

2 Q. And as part of those inspections, do you
3 remember if you ever went to quench tower number 2
4 to check to see if there were baffles in there?

5 A. Yes, I did.

6 Q. All right. Do you remember when you did that?

7 A. No.

8 Q. All right. How many times did you do it after
9 that?

10 A. I believe once.

11 Q. Do you remember when that was?

12 A. I can only approximate it.

13 MR. PIAGGIONE: Objection. He's already
14 asked and answered that he did not know the date.

15 THE COURT: Overruled. You may answer.

16 THE WITNESS: Probably 2005, in that area.

17 MR. PIAGGIONE: Object again, your Honor.
18 He said he's guessing.

19 THE COURT: You may cross-examine.
20 Overruled.

21 BY MR. PERSONIUS:

22 Q. All right. I want to be clear, I don't want a
23 guess from you. If what you're giving is a guess,
24 tell us, because we don't want a guess.

25 Do you have a recollection when it was?

1 A. No, I do not.

2 Q. All right. But you recall one time after this
3 letter was sent you checked inside tower number 2?

4 A. Yes.

5 Q. And your purpose in looking inside the tower
6 was what?

7 A. To determine compliance with our Part 214
8 regulation.

9 Q. Okay. And what specifically of that regulation
10 were you looking for?

11 A. To basically see if the baffles were in place.

12 Q. Do you remember what you saw when you looked?

13 A. No, I don't --

14 Q. Okay.

15 A. -- exactly. I recall either -- I know it was a
16 violation, I recall that. But whether or not there
17 was some baffles still remaining in place, or
18 whether they were all removed, that part of it I
19 don't remember.

20 Q. When you say "there was a violation", did you
21 mean a violation of the baffles requirement?

22 A. Yes, I do.

23 Q. Okay. And was Mr. Kamholz with you on this
24 occasion when you looked in the quench tower?

25 A. Yes, he was.

1 Q. All right. Did you have a conversation with
2 him?

3 A. I recall reminding him again of the requirement
4 in Part 214 that baffles be in place.

5 Q. Okay. Did he respond?

6 A. No. I don't --

7 Q. And did you ever check again to see if the
8 baffles had been -- had been put in there?

9 A. No, I did not.

10 Q. All right. Was there a -- was there a reason
11 you didn't go back and check again -- check again
12 in tower number 2 to see if baffles were in place?

13 A. Yes. Yes.

14 Q. Okay. Can you tell the jury what the reason
15 was, please?

16 A. Based on my past dealings with Mr. Kamholz, if
17 I typically needed something done or looked at, or
18 there was a report of excessive smoke from the
19 facility, I'd call up Mr. Kamholz and ask him to
20 look into it and take care of it, and it typically
21 was always done to my satisfaction. And I made the
22 assumption he'd do the same thing with the baffles.

23 Q. All right. These conversations you'd had with
24 him about the relative merits of the baffle system,
25 did you continue -- I think you said you continued

1 to have those conversations with him throughout the
2 period you did your inspections, correct?

3 A. Correct.

4 Q. And should we understand those conversations
5 continued after this occasion that you've testified
6 that you looked and saw either no baffles or a
7 violation in tower number 2?

8 A. No, I don't believe we discussed it after that.

9 Q. Now, do you remember, Mr. Foersch, that
10 Mr. Kamholz was arrested in late December of 2009?

11 A. Yes.

12 Q. And you learned about that somehow? That he
13 had been arrested.

14 A. Yes.

15 Q. And do you remember that a private investigator
16 named Tom Thurston came to talk to you on two
17 occasions in January --

18 A. Yes, I do.

19 Q. -- of 2010?

20 A. Yes, I do.

21 Q. Okay. And he prepared a report each time,
22 correct?

23 A. Yes.

24 Q. You've seen those reports?

25 A. Yes.

1 Q. Right. And do you agree that in both of those
2 reports you told Mr. Thurston that you were aware
3 that there were no baffles?

4 MR. PIAGGIONE: Objection, your Honor.
5 This is not a statement in evidence, and it's also
6 leading.

7 THE COURT: Overruled.

8 MR. PIAGGIONE: And it's not proper on
9 direct.

10 THE COURT: You may answer -- or ask the
11 question.

12 BY MR. PERSONIUS:

13 Q. I'll ask it again. You've reviewed Mr.
14 Thurston's two reports, right?

15 A. Yes.

16 Q. I've given them to you, right?

17 A. Yes.

18 Q. And actually when Mr. Thurston came to see you
19 the second time, he brought with him his report
20 from the first time he came to see you, right?

21 A. Yes, he did.

22 Q. Okay. And he allowed you to read it, right?

23 A. Yes.

24 Q. And he allowed you to make changes to it,
25 right? Do you remember that?

1 A. He asked me to sign it.

2 Q. And he also said I you want you to read this
3 and before you sign it, I you want you to make --

4 MR. PIAGGIONE: Objection, your Honor.
5 This is leading and this is direct.

6 THE COURT: Overruled. You may answer.
7 Did he say that or not?

8 BY MR. PERSONIUS:

9 Q. Do you remember the second time Mr. Thurston
10 gave you his first report and said I'd like you to
11 read this?

12 A. Yes.

13 Q. And he said if you want to make any changes to
14 it, please do so?

15 A. Yes.

16 Q. And included in that first report was an
17 indication that you were fully aware that neither
18 tower number 1 nor tower number 2 had baffles in
19 them, correct? Do you remember his report said
20 that?

21 A. His report said that, yes, it did.

22 Q. And what you asked him to do was to take out
23 the word "fully"?

24 MR. PIAGGIONE: Objection, your Honor.

25 THE COURT: Overruled.

1 BY MR. PERSONIUS:

2 Q. Is that true?

3 A. Yes, I did.

4 Q. Okay. And once he took out "fully", he asked
5 you to sign the document, right?

6 A. Yes.

7 Q. And you declined to sign or initial the first
8 report, right?

9 A. Yes.

10 Q. Okay. And the reason for that was that in
11 between the first visit by Mr. Thurston and the
12 second visit by Mr. Thurston, you had talked to a
13 DEC attorney --

14 MR. PIAGGIONE: Objection, your Honor.

15 This is continually leading, talking now about
16 hearsay with a --

17 THE COURT: It is leading at this point.

18 So, sustained.

19 BY MR. PERSONIUS:

20 Q. Between the first Thurston visit and the second
21 Thurston visit had you spoken to someone about the
22 first visit?

23 A. Yes.

24 Q. Okay. Who was that?

25 A. I would have spoken to DEC attorneys.

1 Q. All right. And do you remember who that was?

2 A. Yes.

3 Q. Who was it?

4 A. Theresa.

5 Q. Theresa's last name is?

6 A. Mucha.

7 Q. Okay. M-U-C-H-A?

8 A. Yes.

9 Q. And so when Mr. Thurston came the second time,
10 and he had you read the report from the first
11 interview?

12 A. Yes.

13 Q. Okay. And you told him to take out the word
14 "fully", right?

15 A. Yes.

16 Q. And the reason that you wouldn't then initial
17 or sign the report was because you had talked to
18 Miss Mucha?

19 A. No. I did it on my own accord.

20 Q. All right. But the -- other than have him take
21 out the word "fully" in front of "aware", that's --
22 you agreed to his first report?

23 MR. PIAGGIONE: Objection again, asked and
24 answered.

25 THE COURT: I'll permit this, and move on.

1 MR. PERSONIUS: Yes.

2 THE WITNESS: Yes.

3 BY MR. PERSONIUS:

4 Q. Okay. Thank you. Following 1997 did you
5 continue to do inspections at Tonawanda Coke
6 through your retirement?

7 A. Yes.

8 Q. Okay. And could we have Defense Exhibit HHH
9 for identification put on the screen for
10 identification?

11 Do you recognize this exhibit, Mr. Foersch?

12 A. Yes.

13 Q. Okay. And just generally, what is it, please?

14 A. It's basically a printout from entries that we
15 would make into our computer system after
16 performing an inspection so that it's logged into
17 the system.

18 Q. All right. And this -- this particular
19 inspection was on what date, please?

20 A. Can I see the rest of the form?

21 Q. That's all we have for this exhibit. I put a
22 red line to try to draw your attention to what I
23 understand to have been the date. Is that helpful
24 or not?

25 A. The way that form was, as I recall it -- and

1 occurred after the issuance of the Title V permit,
2 which was in 2000 --

3 MR. PIAGGIONE: If I recall correctly, I
4 heard both, your Honor.

5 THE COURT: Let's clarify, please.

6 BY MR. PIAGGIONE:

7 Q. The conversation you had with Mr. Kamholz in
8 the east quench tower the last time you were at the
9 east quench tower, was that after the letter in
10 1997?

11 A. Yes.

12 Q. Okay. And where were you standing when you had
13 that conversation?

14 A. It would have been outside the -- let's see,
15 east door on the quench tower.

16 Q. Okay. And can you describe what it would be
17 like to enter the quench tower?

18 A. To get to the quench tower?

19 Q. To get -- to enter the east quench tower to see
20 the baffles.

21 A. Well, to approach the quench tower you have to
22 climb down a bit of a pile of coke, and I actually
23 don't go into the oven -- or into the -- into the
24 tower. You stand at the door and look in. It's
25 not -- it's an electrically charged area, it's wet,

1 and it's a dangerous place, and you stay as far
2 away as you can to still be able to observe and
3 determine compliance.

4 Q. Okay. And did you tell him at that time that
5 the tower needed baffles?

6 A. I advised him that the regulations required
7 baffles.

8 Q. And did Mark -- did Mr. Kamholz raise an
9 argument about upward velocity at that time?

10 A. No.

11 Q. Okay. Did he argue about the efficiency of
12 baffles?

13 A. No.

14 Q. All right. He didn't object, is that correct?

15 A. Yes.

16 Q. And based upon your conversation and your
17 previous dealings Mr. Kamholz, you expected him to
18 place baffles in the east quench tower?

19 A. Yes.

20 Q. Okay. And the next year did you -- did you
21 conduct the annual compliance inspection for the
22 next year at Tonawanda Coke?

23 THE COURT: Put that question again,
24 please.

25 BY MR. PIAGGIONE:

1 Q. Sorry. After that conversation did you return
2 the next year to conduct an annual compliance
3 evaluation inspection?

4 A. Yes, I did.

5 Q. Okay. And during that inspection, did you ask
6 Mr. Kamholz if he had put baffles in the east
7 quench tower?

8 A. Yes, I did.

9 Q. And what did he say?

10 A. He said yes.

11 Q. Okay. And you never checked the east quench
12 tower again, is that correct?

13 A. No, I did not.

14 Q. All right. And you said you inspected the
15 by-products area 15 times. Is that 15 times
16 since -- from 1984 to 2009?

17 A. I would say -- yeah, that's a good
18 approximation.

19 Q. Okay. So that's approximately 15 times in 25
20 years, is that correct?

21 A. Yes.

22 Q. Okay. Now, with respect to the inspections
23 that you conducted at Tonawanda Coke, when you went
24 there, did Mark Kamholz always escort you around
25 the facility?

1 A. Yes, he did.

2 Q. Okay. And is it fair to say that Mr. Kamholz
3 knew where you went on inspections?

4 A. Yes, he did.

5 Q. And did you always follow basically the same
6 routine when you conducted inspections?

7 A. Pretty much so, yes.

8 Q. Okay. And when Title V -- when the Title V
9 permit was issued, did the focus of your inspection
10 change?

11 A. Yeah, somewhat.

12 Q. Okay. Was it spent more on reviewing documents
13 than looking at apparatus?

14 A. Yes, it was.

15 Q. Okay. And then your Title V permit compliance
16 inspections, did that include checking every
17 condition of the permit physically?

18 A. No. No, it wouldn't.

19 Q. Okay. And yet you would check off that they
20 were in compliance, was that only in respect to
21 what you observed, is that correct?

22 A. Yes.

23 Q. Okay. And is it fair to say you relied upon
24 Tonawanda Coke to be in compliance with the
25 conditions of the Title V permit you did not view

1 during your inspection, is that correct?

2 A. Yes.

3 Q. Okay.

4 MR. PIAGGIONE: Can I have a moment, your
5 Honor?

6 THE COURT: Yes.

7 MR. PIAGGIONE: If I may continue for one
8 moment?

9 THE COURT: Certainly.

10 BY MR. PIAGGIONE:

11 Q. Thank you. Mr. Foersch, you said Mr. Kamholz
12 was with you on every inspection, is that correct?

13 A. Yes.

14 Q. Okay. So he would know those conditions that
15 you did not inspect during your -- he would not
16 know which conditions you did not inspect --
17 withdrawn.

18 He would know what conditions in the Title V
19 permit that you did not physically inspect during
20 your inspection, is that correct?

21 A. I don't think he would have any idea what I was
22 going to do on a particular inspection.

23 Q. Okay. Incidentally, were you ever trained to
24 be a RCRA inspector at any time?

25 A. No.

1 Q. Thank you.

2 THE COURT: Anything, Mr. Personius?

3 REDIRECT EXAMINATION BY MR. PERSONIUS:

4 Q. Mr. Foersch, when you and I were going through
5 your direct testimony this morning, do you remember
6 that I referred to a couple of occasions when you
7 were interviewed by a private investigator named
8 Mr. Thurston?

9 MR. PIAGGIONE: Objection, your Honor.
10 We're now going beyond the scope of the cross.

11 MR. PERSONIUS: This was covered by
12 Mr. Linsin, your Honor.

13 THE COURT: I'm sorry?

14 MR. PERSONIUS: It was covered by
15 Mr. Linsin.

16 MR. PIAGGIONE: It's defense, your Honor.

17 THE COURT: No. That's -- that's
18 testimony that can be inquired into. I'll permit
19 it, but you have to rephrase the question please.

20 BY MR. PERSONIUS:

21 Q. Do you remember during my questioning of you
22 this morning that we discussed your two contacts
23 with an investigator named Thurston in January
24 of 2010?

25 A. Yes.

1 Q. Okay. And the questions had to do with you
2 acknowledging to Mr. Thurston that you knew there
3 were not baffles in quench tower number 2, do you
4 recall that?

5 A. The question again, please?

6 Q. Yes. Do you remember that the reason I brought
7 up Mr. Thurston was to address your awareness that
8 there were no baffles in quench tower number 2, do
9 you remember that?

10 A. Yes.

11 Q. And we went through him showing you the first
12 report the second time he saw you, do you recall
13 that?

14 A. Yes.

15 Q. And he gave you an opportunity to change his
16 report remember? Do you remember that?

17 A. Yes.

18 Q. Okay. And the only change you asked for was
19 the word "fully" be removed from in front of the
20 word "aware", right?

21 A. Yes.

22 Q. And am I correct that you agreed that you told
23 Mr. Thurston both -- on both times you saw him in
24 January of 2010 that you were aware there were not
25 baffles in quench tower number 2?

1 A. But at what time -- I documented there -- well,
2 I didn't document, I observed there not being
3 baffles.

4 Q. Did you tell Mr. Thurston you were aware that
5 there were no baffles in quench tower number 2?

6 A. Yes.

7 Q. And isn't it true, Mr. Foersch, that you knew
8 from the time you last looked in quench tower
9 number 2 until you retired, you knew in your heart
10 of hearts that there were not baffles in that
11 quench tower, isn't that true?

12 MR. PIAGGIONE: Objection again, your
13 Honor. This is direct, and this is leading.

14 THE COURT: Well, let's get an answer and,
15 that's it. Move on.

16 You may answer.

17 THE WITNESS: I had a gut feeling that
18 there weren't baffles in there.

19 BY MR. PERSONIUS:

20 Q. Thank you. Now, you were asked by
21 Mr. Piaggione on his examination about
22 conversations you had with Mr. Kamholz regarding
23 this issue with the flow of the steam and the
24 particulates and the height of the tower, do you
25 remember that topic?

1 A. Yes.

2 Q. Okay. And he asked you if you told Mr. Kamholz
3 that you still needed baffles, do you recall that?

4 A. Yes.

5 Q. And you said occasionally I did, correct?

6 A. Yes.

7 Q. And can we infer from that or conclude from
8 that on other occasions when you had the
9 conversation, you did not tell him that baffles
10 were still required, true?

11 A. Yes.

12 Q. All right. Now, you've testified in response
13 to a question by Mr. Piaggione that a year after
14 this last inspection of quench tower number 2 that
15 you had a conversation with Mr. Kamholz?

16 A. Yes.

17 Q. And that what you've told the jury is that you
18 actually asked him do you have baffles in that
19 quench tower, is that what you're recalling?

20 A. Yes, I did.

21 Q. And you're telling the jury that your
22 recollection is that he said yes, there were
23 baffles in there?

24 A. Yes.

25 Q. Could we please put just for identification,

1 Lauren, back on the screen Mr. Foersch's grand jury
2 testimony, which is Government Exhibit 3521.16.

3 And there is your -- the first page of your
4 grand jury testimony, Mr. Foersch, from July
5 29, 2010, is that correct?

6 A. Yes.

7 Q. Would you go please, Lauren, to page 23. Could
8 you make that upper portion larger, please?

9 The question on line 1 was: "And you say you
10 looked in there and you saw some baffles in
11 disrepair." And your answer was: "Correct." Do you
12 see that?

13 A. Yes.

14 Q. Lauren, could you put the full page back up
15 again, please. And would you make that part bigger
16 please?

17 And then you were asked on line 23, "But you
18 didn't document it?" And your answer was, "no".
19 And then the question was: "Did you follow up with
20 him?" Do you see that?

21 A. Yes.

22 Q. Would you go to the next page please, Lauren?
23 We're on page 24.

24 And your answer was: "No." And then the
25 question was: "Why not?" And your answer was: "I

1 guess one of those discretionary things that you
2 sometimes do." Is that correct?

3 A. Yes.

4 Q. And to be clear, when you testified in the
5 grand jury two and a half years ago, you didn't
6 tell the grand jury about this conversation you're
7 telling us that you had today, is that true?

8 A. True.

9 MR. PERSONIUS: All right. May I have a
10 minute, Judge?

11 Your Honor, we have nothing further.

12 Thank you, Mr. Foersch.

13 THE COURT: Okay. Mr. Linsin, anything?

14 MR. LINSIN: Nothing further, your Honor.

15 Thank you.

16 THE COURT: Okay.

17 MR. PIAGGIONE: I have a few more
18 questions, your Honor, if I may.

19 THE COURT: Okay.

20 RECROSS-EXAMINATION BY MR. PIAGGIONE:

21 Q. Mr. Foersch, you said based upon your gut
22 feeling in prior cross -- rather redirect
23 examination. Based upon your gut feeling did you
24 ask Mr. Kamholz were there baffles in the east
25 quench tower, and he said yes, is that correct?

1 A. Correct.

2 Q. Okay. And did you ever tell Mr. Kamholz that
3 baffles were not required in the east quench tower?

4 A. No.

5 Q. Okay. And with respect to the grand jury
6 testimony, did you note that there were
7 inaccuracies in that testimony when you read it?

8 A. Not -- grand jury or Thurston's?

9 Q. Withdrawn. With respect to the grand jury
10 testimony, you said you never followed up. Yet
11 there is this follow-up that you did on the
12 following year inspection. That seems to be in
13 conflict. Can you explain that?

14 A. Yes, I can.

15 Q. Would you, please?

16 A. I was never asked the question in the grand
17 jury if I did any subsequent -- if I did any
18 follow-up on it or whatever.

19 Q. Well, the question was: "Did you follow up on
20 it?" Did you misunderstand the question in the
21 grand jury?

22 A. I'd like to read it again if I could.

23 Q. 3521.16.0023. We have to go down one more
24 line.

25 THE COURT: It's the next page.

1 MR. PIAGGIONE: It's the next page, I'm
2 sorry. 24. Okay. All right. Could you read that
3 again?

4 Do you want to explain that now?

5 THE WITNESS: What I was referring to --

6 THE COURT: Well, no, you can't do to that
7 way.

8 BY MR. PIAGGIONE:

9 Q. Okay. Does that refresh your memory at all?

10 A. Yes, it does.

11 Q. Do you want to explain why you said you did not
12 follow up in the grand jury?

13 A. I was referring to in the short-term, like
14 within a month or two, and not that I never
15 inquired about it again.

16 MR. PIAGGIONE: No further questions, your
17 Honor.

18 THE COURT: Okay.

19 MR. PERSONIUS: I'll try not to do this,
20 Judge, but --

21 REDIRECT EXAMINATION BY MR. PERSONIUS:

22 Q. Could we please have for identification,
23 Lauren, the grand jury testimony, Government
24 Exhibit 3521.16?

25 Do you see that on the screen, Mr. Foersch?

1 A. Yes.

2 Q. Lauren, could you please go to the page we were
3 on, page 24? And the portion of this that you were
4 just referring to, Mr. Foersch, is at the top of
5 page 24, is that true?

6 A. Yes.

7 Q. Okay. Would you please make that bigger,
8 Lauren?

9 Now, on that same page, on line 15, you were
10 asked: "Did you ever ask him if he did?" And your
11 answer was: "That I don't remember if I did or
12 not." Is that what your testimony was two and a
13 half years ago in the grand jury?

14 A. Yes.

15 Q. And that was referring to talking to
16 Mr. Kamholz about whether or not he had put baffles
17 in tower number 2, correct?

18 A. Could I read a little more of it?

19 Q. Sure. Would you let Mr. Foersch read page 24,
20 Lauren?

21 Have you had a chance to read page 24?

22 A. Yes.

23 Q. Do you agree that's what your response related
24 to?

25 A. Yes, I do.

1 MR. PERSONIUS: Nothing further, Judge.
2 You can take that down, Lauren.

3 THE COURT: Keep it up. Do you want to
4 refer to it, or are you going somewhere else?

5 MR. PIAGGIONE: No where else. I can ask
6 from here.

7 RECROSS-EXAMINATION BY MR. PIAGGIONE:

8 Q. Is it your testimony today that you do remember
9 the conversation?

10 A. Yes.

11 Q. Okay. Thank you.

12 MR. PIAGGIONE: No further questions.

13 MR. PERSONIUS: No, Judge.

14 THE COURT: Thank you.

15 Okay. Mr. Foersch, I think that concludes your
16 testimony. You are excused. Thank you very much.

17 (End of requested excerpt.)

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